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HAROLD B. WILLEY, Clerk

In the

Supreme Court of the United States

October Term, 1953

Nos. 618

SAVAGE TRUCK LINE, INCORPORATED,
Petitioner.

v.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF

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v.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

To the Honorable Chief Justice and the Association Justices of the Supreme Court of the United States:

Savage Truck Line, Incorporated, a Delaware corporation, respectfully petitions that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Fourth Circuit entered in these cases on December 21, 1953.

A.

JURISDICTION

The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254, Paragraph (1). The

decision of the United States Court of Appeals for the Fourth Circuit was rendered on December 21, 1953.

B.

SUMMARY STATEMENT OF THE MATTER INVOLVED

These cases arise out of an automobile accident which took place on March 29, 1951, at approximately 5:00 o'clock a.m. between a motor vehicle driven by Zenith F. Payne and owned by Savage Truck Line, Incorporated, and a motor vehicle driven by Bernard R. Harris and owned by Brooks Transportation Company, Incorporated. The accident took place on U. S. Route 1, a 4-lane highway, in the County of Hanover, Virginia, on a southeast to northeast curve of the highway which runs generally north and south.

The Savage vehicle was an open-top van with sides about seven feet high and was carrying six cylindrical containers containing aircraft engines belonging to the United States Navy Department, which aircraft engines had been placed upon the Savage vehicle in an upright position and had been secured thereon on the day before the accident by employees of the United States Navy Department at Norfolk, Virginia, for transportation from the Norfolk Naval Base to Quonset Point, Rhode Island. The six cylindrical containers were lined up one behind the other on the Savage vehicle, and each weighed approximately 5,000 pounds. Five of them were nine feet, three inches tall, one was seven feet, seven inches tall, and each was approximately sixty-five inches in diameter.

The Savage vehicle was moving north, and as it entered the curve one or more of the containers constituting its load

shifted to the left and caused the Savage vehicle to cross from the extreme right-hand northbound lane of traffic over the northbound passing lane and over the double line marking the center of the highway into the southbound passing lane at a time when the Brooks vehicle was proceeding south in the extreme right-hand southbound lane. As the vehicles were passing, one or more of the cylindrical containers fell from the Savage vehicle and came in collision with the Brooks vehicle, causing the instant death of Bernard R. Harris.

It is readily seen that the cause of this accident was the sudden shifting of the Savage cargo with the consequent loss of control by the Savage driver and the ultimate falling of one or more of the containers from the Savage vehicle into the path of the Brooks vehicle. Responsibility for the accident is fixed when it is determined what person or persons is legally responsible for the shifting of the cargo.

Frances E. Harris, executrix of the estate of Bernard R. Harris, filed two separate suits in the United States District Court for the Eastern District of Virginia to recover damages for the death of Harris, the Brooks driver. In one of these suits she sued Savage, obtaining jurisdiction on the ground of diversity of citizenship, and in the other she sued the United States of America under the Federal Tort Claims Act. Brooks Transportation Company, Incorporated, also filed two separate suits under the same jurisdictional theories against the same defendants to recover damages done to its motor vehicle and cargo. In each of the four suits the respective defendants, Savage or the United States, filed third-party complaints against the other defendant, seeking contribution or indemnity for any liability established against it in favor of the primary plaintiffs,

each alleging that the other was responsible for the shifting of the Savage cargo. In the Brooks v. United States v. Savage case the United States also asked for recovery against Savage for the damage done to its aircraft engines, and Savage filed a counterclaim against the United States asking for recovery for the damage to its truck. The four cases were consolidated for hearing. The two suits against Savage were tried before a jury at the same time that the two suits against the United States were tried before the District Judge. The jury found against Savage in both of the suits, and the District Judge found against the United States in both of those suits. The District Judge subsequently entered findings of fact and conclusions of law in the two suits against the United States and also in the other suits in order to establish the rights of the two defendants to contribution or indemnity. The effect of the proceedings in the District Court was that the United States and Savage were both found negligent and, therefore, both were found to be liable to the primary plaintiffs with the right of contribution to the extent of fifty per cent of the judgment when either defendant should satisfy the judgment, and that in no event would either defendant be entitled to full indemnity or a one hundred per cent recovery from the other defendant. The United States was denied recovery for the damage sustained by it to its aircraft engines because of its own negligence, and in the same way Savage was denied recovery for the damage done to its motor vehicle because of its own negligence.

The United States and Savage have both subsequently admitted that they are liable to Brooks and Harris, and the only questions remaining in the cases are the respective rights of the United States and Savage to indemnity or contribution and to recover their own damages.

We will now mention more specifically the findings of the District Court. The United States Navy Department was found to have undertaken the loading and securing of the cargo in accordance with its normal practice and to have assumed responsibility for such loading and securing. The standard working arrangement between all carriers in the Norfolk area and the Navy Department is for the Navy Department to do all loading and securing of cargo.

The District Court found that the United States, acting through the individual officers and employees of the Navy Department, was guilty of negligence in failing to exercise ordinary care to secure the containers, in the means used to secure the containers, in failing to inspect properly the loading before turning it over to Savage Truck Line, Incorporated, for transportation, and in failing to supervise properly the employees who attended to the securing, and further that such negligence was a proximate cause of the shifting of the load and the falling of one or more of the containers from the Savage truck (R. p. 23).

The District Court found that Savage was negligent in failing to exercise ordinary care in accepting the cargo for transportation and that the driver of the Savage truck failed to exercise ordinary care in the operation of the truck, having knowledge of the nature of the cargo and the method of loading and securing, and further that such negligence was a proximate cause of the accident (R. p. 23).

The United States filed an appeal in each of the four cases to the United States Court of Appeals for the Fourth Circuit, and Savage filed cross-appeals. The cases were consolidated for hearing in the same way they were consolidated in the District Court and in the same way they are being treated in this petition.

The United States in its brief before the Court of Appeals and in oral argument conceded that there was evidence to support the findings of negligence against it. Savage contends that the findings of negligence against it are based upon an erroneous application of law in reference to its duties in the light of its relationship with the United States.

The Court of Appeals expressly sustained the finding that both the United States and Savage were negligent, but then said on page 11 of its opinion (R. p. 115), "In the present case a combination of factors clearly shows that the *principal fault* lay with the carrier." (Italics supplied.) This assertion is not supported by either the facts or the law, and no such finding was entered or requested in the District Court. But solely on the basis of this assertion the Court of Appeals allowed the United States full indemnity—not just contribution—and saddled the whole loss upon Savage.

Having sustained the District Court's finding of negligence against Savage, the Court of Appeals very properly ruled that Savage could not recover for the damage to its motor vehicle, but the Court then allowed the United States to recover for the damage to its aircraft engines despite the fact that the United States had conceded its negligence.

The effect of the opinion of the Court of Appeals is that Savage will be required to pay the judgment in favor of Harris for $15,000 and the judgment in favor of Brooks for $5,844.83 with costs and interest added, and in addition will have to pay to the United States of America approximately $12,000 on account of the damage done to its aircraft engines, and that Savage will have no right of contribution or indemnity from the United States.

C.

THE QUESTION PRESENTED

All of the facts involved in this case arose in Virginia. The suits against Savage were based upon diversity of citizenship, and the suits against the United States were brought under the Federal Tort Claims Act which generally requires the Federal Courts to look to state law for a determination of the cases. There are two questions presented by this petition. First, whether under Virginia law Savage is entitled to contribution from the United States for the damage to third persons caused by the joint negligence of it and the United States. Second, whether under Virginia law the United States is entitled to recover from Savage for damages done to the property of the United States by the joint negligence of Savage and the United States. There is also the subsidiary question of what duties devolved upon Savage in view of its relationship with the United States in this case.

D.

REASONS RELIED ON FOR ALLOWANCE OF WRIT

There are two reasons why this petitioner feels a writ should be granted, as follows:

(1) In paragraph 5 (b) of Rule 38 of the Rules of the Supreme Court the character of reasons which will be considered in acting upon a petition for writ of certiorari are stated. One of the reasons is as follows:

> "Where a Circuit Court of Appeals * * * has decided an important question of local law in a way probably in conflict with applicable local decisions * * *."

The Court has stated that these reasons are not controlling and do not fully measure the Court's discretion, but it is clearly indicated that this Court will consider granting a petition for writ of certiorari when the above quoted reason exists.

This petitioner believes that the above consideration precisely applies here. Section 8-627, Code of Virginia, 1950, and all cases construing same require that contributing or joint tort feasors shall contribute equally to pay the injured persons. Instead of following the Virginia statute and decisions, the Court of Appeals in this case applied a doctrine of "principal fault" which is not recognized in Virginia. Virginia has specifically rejected the principle of comparative negligence, which in reality is the basis of this decision.

The effect of the Court's failure to apply Virginia law and in its stead to substitute a doctrine foreign to Virginia law is important and may have far-reaching consequences in joint tort feasor cases in this State.

To understand the importance of the law governing the liability of one contributing or joint feasor to another we need only consider certain basic facts. The vast majority of all litigation today is based upon negligence, with the largest volume of those cases arising out of automobile accidents. Statistics are unavailable to establish the percentage of those cases involving the law governing the relationship of two or more alleged contributing or joint tort feasors, but the number of such cases must be considerable. To illustrate, in the busy and congested streets of our cities the "typical intersection accident case" frequently arises, in which passengers or pedestrians are injured and have the right to sue both drivers. For that matter the same law is involved in any situation where two or more

persons can be argued to have caused or contributed to cause fires, explosions, accidents, and catastrophes which result in injuries to third persons.

Although the Court of Appeals thought that it was applying the Virginia law in allowing indemnity, it is clear that it failed to do so and invoked a doctrine which is not recognized in Virginia: namely, that of comparative negligence. The result of permitting this opinion to stand will inevitably be confusion in the Federal Courts of this State in future jcint tort feasor cases.

(2) The Court of Appeals in this case held Savage liable to the United States for the damage done to its aircraft engines. The Court enunciated as a general rule of law that a common carrier is liable for the loss of a shipper's goods when the shipper negligently loads and secures the goods if the defect in securing is apparent to the carrier. The duties arising from the relationship between carriers and shippers are national in scope and are brought into play whenever the United States or any private citizen ships cargo by a common carrier, loading and securing said cargo himself.

The effect of the rule enunciated in this case is to deny a common carrier the defense of contributory negligence in certain cases and works a hardship upon all motor, rail, and air transportation, most of which is interstate. This makes the question of considerable importance to the country generally and to the Federal Government in particular. Furthermore, we submit that a fair analysis of the authorities demonstrates that the rule has questionable support and this Court should take jurisdiction and clarify this important question of law.

A supporting brief accompanies this petition.

WHEREFORE, Your petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered by that Court on December 21, 1953; and that this Court reverse so much of the judgment of the United States Court of Appeals for the Fourth Circuit as changed the judgment of the United States District Court for the Eastern District of Virginia and re-instate the judgment of the District Court.

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I.

OPINIONS OF THE COURTS BELOW

The findings of fact and conclusions of law of the United States District Court for the Eastern District of Virginia are to be found on pages 21-27, inclusive, of the printed record. The opinion of the United States Court of Appeals for the Fourth Circuit is found at pages 107-116, inclusive, of the printed record. This opinion has not yet been reported in the Federal Reporter System.

II.

JURISDICTION

The jurisdiction of this Court is invoked under Title 28, U. S. Code, Section 1254, Paragraph (1). The judgment of the United States Court of Appeals for the Fourth Circuit to be reviewed was entered on December 21, 1953.

III.

STATEMENT OF THE CASE

A statement of the case appears under heading "B" of the petition for writ of certiorari. In the interest of brevity this statement is not here repeated, but it is referred to with the request that it be considered incorporated herein by reference.

IV.

QUESTION PRESENTED

The questions specifically brought forward by the petition for a writ of certiorari appears under the heading "C" of the petition. Again the statement is not here repeated in the interest of brevity, but is referred to with the request that it be considered incorporated herein by reference.

V.

SUMMARY OF THE ARGUMENT

Savage contacted to transport the aircraft engines, which the United States, acting through the Navy Department, assumed the duty of loading and securing for normal transportation. The Navy negligently performed this obligation, and the accident and the consequent death and property damages resulted.

It is provided by regulations of the Interstate Commerce Commission, 49 C.F.R. 193.9, that the load on every motor vehicle transporting property shall be secured in order to prevent unsafe shifting of the load. Savage concedes that this duty devolved upon it and that it cannot delegate this duty in such a way as to insulate itself from liability to members of the general public injured by a breach of this duty. Savage cannot delegate to the United States its duties to the general public and escape liability for the same reason that a landowner cannot delegate to an independent contractor his duties to the general public and escape liability, but the landowner is allowed full indemnity of the independent contractor for the liability thus incurred. There are many similar situations in the law.

Of course, if Savage was guilty of negligence, other than that *charged to it* as a result of derelictions of the Navy in discharging the duty to secure, Savage cannot claim full indemnity of the United States. Properly construed, there was no finding of such other negligence against Savage by the District Court, but assuming that such does exist the result now obtaining in this case does not follow.

The Navy's negligence was not derivative like that of a master for the acts of his servant. The District Court has found and the United States concedes that the Navy was guilty of primary negligence which continued to operate and combined with that of Savage caused the accident. Under the law of Virginia this renders both Savage and the United States liable for the full amount of the plaintiffs' damages. Virginia has rejected the doctrine of "comparative negligence." One is either negligent and liable or not negligent and not liable. There is no middle ground.

In the early law a contributing or joint tort feasor could not enforce contribution from the other tort feasor, but

this has been modified in most jurisdictions either by decision or legislation. Virginia has adopted the latter course. For this reason the District Court adjudged that Savage or the United States should have contribution from the other when either of them should pay the judgments of the primary plaintiffs.

The Court of Appeals in this case, however, decreed that the United States should have full indemnity, not just contribution, from its joint tort feasor. Full indemnity is granted in certain cases, of course. One of these is the landowner case mentioned above. Another is in the master-servant cases when the master is allowed indemnity from the servant for liabilities caused by the act of the servant. In the same way a municipality held liable under its general duty to maintain streets and sidewalks may have indemnity against the person actually creating the condition rendering the municipality liable. All these situations are shown below to be inapplicable to the claim of the United States for indemnity. The Court of Appeals allowed indemnity under the theory that "the principal fault" for the accident "lay with the carrier." While the Court of Appeals accepted the District Court's findings of facts, there was no finding of "principal fault" by the District Judge. Under Virginia law *degree of fault* is meaningless once negligence and proximate cause are found. This proposition is axiomatic in Virginia.

That the United States cannot recover for the damages to its aircraft engines would seem to follow from the above showing of negligence on the United States, but the Court of Appeals invoked a principle of law to the effect that when the defect in securing *is apparent* the carrier is liable notwithstanding the negligence of the shipper. It will be shown below that the defect here was not apparent in the sense

intended in the rule, but it will be further shown that the rule itself is unsound, certainly as applied in this case.

VI.

ARGUMENT

(a) Legal Relationship Between Savage and the United States.

The Navy Department at Norfolk customarily loads and secures all cargo that is being shipped by it regardless of the means of transportation employed. Very considerable numbers of aircraft engines are shipped in and out of this installation. The motor carriers, Savage included, customarily place empty vans at the various loading docks, and Navy employees at their convenience and under the supervision of other Navy employees, using methods and means devised and approved by the United States Navy Department, load and secure the cargo. When cargo is being shipped on a closed van, the Navy Department puts a seal upon the van which canont be broken by the carrier. Of course, when an open-top van is employed, as was the situation here, a seal would be pointless, but this demonstrates how completely the Navy Department takes over the responsibility for loading and securing. The District Court found that the Navy Department in this case negligently performed its assumed duty to load and secure properly and further that this negligence was a contributing factor to the accident. In particular the District Court found that the United States failed to exercise reasonable care to secure the containers, failed to use proper means to secure the containers, failed to inspect properly the loading of the vehicle before releasing it to the carrier, and failed to supervise properly its employees who attended to the securing of the containers.

When the Savage driver began his trip with this cargo, he was in the position of a person carrying a time bomb which might explode at any moment, but he did not *know* he was transporting such an instrument of destruction. There was no custom or usage or agreement between the United States Navy Department and the carriers to the effect that aircraft engines were to be handled or transported in any different way than was used with any other cargo. The Savage driver then was under the duty to drive in the normal manner, using the normal care and caution expected of any driver of a large tractor-trailer, unless he had some special *knowledge* requiring him to use extra care and caution. There is no finding that the Savage driver did not use normal care and caution. The findings against Savage were that the employees of Savage failed to exercise ordinary care in accepting the load and in the operation of the truck *having knowledge of the nature of the cargo and the method of loading and securing.* Clearly these findings charge Savage with some special knowledge rendering Savage negligent for accepting this particular shipment of aircraft engines and for driving in a normal and what usually would be regarded a non-negligent manner. Are there facts and is there law charging Savage with this knowledge concerning this particular shipment?

The Savage driver, Payne, inspected the cargo before leaving Norfolk to see that the securing straps were in place and found that they were. This was the extent of his duty. In the case of *Hines* v. *Buchanan,* 131 Va. 88, 109 S.E. 219, the court held that there was no duty to make a detailed inspection. In that case Mrs. Buchanan employed a Richmond firm, Smith and Hicks, to load her household goods into a box car for shipment. It was conclusively established that the property had been improperly loaded, braced, and

secured. The court said on page 107 that "it is very clear from the testimony" that it was not the practice of the railroad company "to make inspections of carloads loaded by shippers, *nor was there any reason why they should do so* * * *." (Italics supplied.)

See also *Pennsylvania Co.* v. *Kenwood Bridge Co.* (Ill.) 40 N.E. 15, and *St. Louis, etc., R. Co.* v. *Glow Electric Co.* (Ohio App.), 172 N.E. 425.

This clearly demonstrates that Savage was under no duty as between Savage and the United States to look for and discover defective loading and securing by the Navy employees.

There is another line of cases to the effect that the carrier need not exercise professional judgment upon facts it possesses to condemn as inadequate the methods employed by the shipper when the shipper assumes the duty and responsibility of securing. Because of his relationship to the carrier the shipper must be assumed to possess superior knowledge and skill. A leading case supporting this proposition is *Ross* v. *Troy and Boston R. R. Co.*, 49 Vt. 364, 24 A.R. 144. In this case the plaintiff owner blocked and fastened a certain piece of machinery to the carrier's car. The machinery was thrown from the car and damaged. In stating the facts the court said:

> "The defendant's servants noticed that the fastenings were not sufficient, but did nothing to make them so."

This is a far stronger finding of fact against the carrier than the finding made in the instant case, and yet the court in the *Ross* case held for the defendant carrier with the following language:

> "It seems incongruous for the plaintiff to *claim that the defendant should overjudge him in a matter in which he assumed to judge* and to do all that he re-

quired or supposed necessary to be done in the premises, and that the defendant should be responsible for the inadequacy of what the plaintiff adjudged and did." (Italics supplied.)

See also Dobie on *Bailments and Carriers,* Section 116, page 337, and the following cases: *Alabama and V. R. Co.* v. *American Cotton Oil Co.,* 249 Fed. 308; *Miltimore* v. *Chicago and Northwestern R. Co.,* 37 Wis. 190; *Cohn* v. *Platt,* 95 N.Y.S. 535; *Ficklin* v. *Wabash R. R. Co.,* Kansas City Court of Appeals, 92 S.W. 347; *Northwestern Marble and Tile Co.* v. *Williams,* 128 Minn. 514, 151 N.W. 419; *Goodwyn* v. *Oregon R., etc., Co.* (Ore.), 28 Pac. 894; and *Rixford* v. *Smith,* 52 N.Y. 355, 13 A.R. 42.

The United States has conceded that the findings against it cannot be attacked and, therefore, has admitted liability to the primary plaintiffs, Brooks and Harris. Savage contends that the findings against it were predicated upon the application of an erroneous principle of law, as it has been shown above that there was no duty as between it and the United States for Savage to inspect the loading nor to substitute its judgment for that of the United States in the methods of loading and securing. Without such duties the findings of negligence on its part fail.

However, assuming the law supports a finding of actual negligence against Savage as distinguished from the negligence *charged to it* because of the Navy's derelictions, we will show below that the negligence of the United States was of such a nature as to preclude its right to full indemnity from Savage and its right to recover the damages done to its aircraft engines.

(b) The Negligence of the United States Is Primary or Actual, Not Derivative.

Nothing will be served by repeating the findings of negli-

gence against the United States. Suffice it to say, that negligence was actual, not constructive nor derivative, and continued to operate until the moment of the impact. *Restatement of the Law, Torts,* Section 282, defines negligence as follows:

> "In the Restatement of this Subject, negligence is any conduct * * * which falls below the standard established by law for the protection of others against unreasonable risk of harm."

It is readily seen that this is precisely the finding against the Navy in this case.

Legal cause is defined in Section 431 of the same work as follows:

> "The actor's negligent conduct is a legal cause of harm to another if
>
> "(a) his conduct is a substantial factor in bringing about the harm, and
>
> "(b) there is no rule of law relieving the actor from liability because of the manner in which his negligence has resulted in the harm."

Subsection (b) can have no application here as the United States had admitted liability to the original plaintiffs, so the only question is whether the Navy's negligence continued to operate up to the time of the accident and was a substantial factor in bringing about the harm. This has been decided below and is undisputed.

In *Atlantic Coast Line R. Co.* v. *Withers,* 65 S.E. 2nd 654, 192 Va. 493, at page 503 the Virginia court approved the following language from *Henderson* v. *Powell,* 221 N.C. 239, 19 S.E. 2nd 876:

> "No negligence is insulated so long as it plays a substantial and proximate part in the injury. Restatement of the Law, Torts, Sec. 447."

(c) Distinction Between Indemnity and Contribution.

The District Court decreed that there should be contribution between Savage and the United States. The Court of Appeals decreed that the United States should have full indemnity.

In 13 Am. Jur., "Contribution," Section 2, we have the following:

> "Contribution is defined as a payment made by each, or by any, of several having a common interest or liability of his share in the loss suffered or in the money necessarily paid by one of the parties in behalf of the others. * * * Contribution imports the idea of equalization of burden, which distinguishes it from indemnity or exoneration and from an equitable right to recover money, * * *."

In 27 Am. Jur., "Indemnity," Section 2, we have the following:

> "In order to secure an adequate conception of the right of indemnity, it becomes necessary to bear in mind the distinctions between it and other rights having many points of resemblance. Thus, the right of contribution, described as the right of one of several persons equally liable for the same debt, who has been compelled to pay the whole of it, to obtain from the others payment of their respective shares, while it resembles indemnity in that it is a suit for reimbursement for a loss suffered for another's benefit, differs from it in that * * * the doctrine of contribution * * * is based on the principle that equality of burden as to a common right is equity, and that wherever there is a common right, the burden is also common. Furthermore *indemnity contemplates full reimbursement, whereas contribution permits of only rateable or proportional reimbursement* * * *." (Italics supplied.)

The difference between contribution and indemnity as applied to this case is simply whether Savage must pay all of the damages of the primary plaintiffs or only one-half. Under Virginia law there is no middle ground.

(d) The United States Is Not Entitled to Indemnity.

There is an excellent discussion of the rules permitting indemnity between tort feasors in the *Restatement of the Law, Restitution.* The general rules concerning indemnity are set forth in Sections 76-85, inclusive. The rules governing indemnity and contribution between tort feasors are set forth in Sections 86-102, inclusive. Section 87 is entitled "Vicarious Liability" and is as follows:

> "Where an agent has committed a tort for which, because of the agency relation, his principle is liable, the principal's rights and liabilities with respect to restitution because of a payment in discharge of the liability are the same *as if he had acted personally,* except
>
> "(a) in an action between himself and the agent, and
>
> "(b) in an action between himself and a person also vicariously liable for the agent's tort or a person colluding with the agent in the commission of the tort." (Italics supplied.)

Subsections (a) and (b) are inapplicable to the case at bar. Therefore, the respective rights of the parties to this suit to indemnity or contribution are the same as though the parties had acted personally in the commission of the wrong.

In Section 88 we have the following:

> "A person who has discharged a tort claim to which he and another were subject

"(a) *is not barred from restitution* from the other by the fact that he personally committed the tort, *if his conduct was not negligent or intentionally wrongful;*

"(b) is barred from restitution if his tort involved seriously wrongful conduct." (Italics supplied.)

Certainly the conduct of the Navy here was negligent and involved seriously wrongful conduct. This has been pointed out numerous times throughout this petition and brief and hardly needs repetition here.

Section 96 is entitled "Person Responsible for Conduct of Another" and is as follows:

"A person who, without personal fault, has become subject to tort liability for the unauthorized and wrongful conduct of another, is entitled to indemnity from the other for expenditures properly made in the discharge of such liability."

Clearly the United States is not "without personal fault" in this case. This section, however, indicates the basis for the contention of Savage advanced in the Court of Appeals to the effect that Savage is entitled to indemnity rather than the United States. Illustration "1" under this section of the *Restatement* is interesting in this connection.

"A employs B as an independent contractor to dig a deep trench on A's land adjacent to the highway. B negligently fails to take the precautions specified by A to protect travelers and C, a traveler, is injured by falling into the trench. C obtains a judgment against A and B. A pays the judgment. He is entitled to indemnity from B."

The United States agreed to secure the cargo in the same way B in the illustration agreed to dig the ditch on A's land. The United States negligently performed its undertaking and as a direct result third parties traveling on the highway

suffered damage. Savage was responsible to the third parties by virtue of the rules of the Interstate Commerce Commerce Commission applicable to carriers as it could not delegate these duties, just as the landowner in the above illustration could not delegate his duties and thus insulate himself from liability.

Another illustration is the case of *Washington Gas Light Co.* v. *District of Columbia,* 161 U.S. 316, 40 L. Ed. 712, 16 Supr. Ct. 564. In this case the District of Columbia sued the gas company for indemnity when the District of Columbia was required to pay a pedestrian who was injured from falling into a hole in the street left by the gas company. Again the analogy is clear.

(e) Virginia Law Requires Contribution Between Joint Tort Feasors.

At the risk of repetition, Savage has contended throughout this case that it was not negligent as between it and the United States and that the findings of the District Court if so construed were based upon an erroneous application of law. The Court of Appeals, however, in effect did so construe the findings of the District Court. This makes Savage and the United States joint tort feasors. Under these circumstances the Court of Appeals should have applied the doctrine of contribution and should not have allowed the United States indemnity against Savage.

At common law even the right of contribution among joint tort feasors is denied. Section 102 of the *Restatement of the Law, Restitution.* However, by statute in Virginia it is expressly required. Section 8-627, Code of Virginia, 1950, provides as follows:

> "Contribution among wrongdoers may be enforced when the wrong is a mere act of negligence and involves no moral turpitude."

This statute has been enforced in a number of Virginia cases. See, for example, *Richmond Coca-Cola Bottling Works, Incorporated,* v. *Andrews,* 173 Va. 240, 3 S.E. 2nd 419. The Virginia Supreme Court of Appeals in the case of *Norfolk, etc., R. Co.* v. *Parker,* 152 Va. 484, 147 S.E. 461, affirmed the language appearing in *Walton, Witten and Graham* v. *Miller,* 109 Va. 210, 214, 63 S.E. 8, as follows:

> "* * * when the negligence of two or more persons concurs in producing a single indivisible injury, then such persons are jointly and severally liable, although there was no common duty, common design or concert of action."

On the basis of this statement and similar statements the Court enforced contribution.

Language to the same effect may be found in the case of *Yonker* v. *Williams,* 169 Va. 294, 299, 192 S.E. 753, wherein the Court said:

> "If two defendants are negligent one of them cannot be exonerated by urging and showing the negligence of the other. Where the concurring negligence of the two produces a single injury and each is its proximate cause they are both liable."

The only Virginia authority cited by the Court of Appeals in the case at bar in support of its proposition that the United States is entitled to full indemnity rather than contribution is *McLaughlin* v. *Siegel,* 166 Va. 274, 185 S.E. 2nd 873. The *McLaughlin* case did not involve joint tort feasors but allowed the master indemnity of his servant for his vicarious liability for the act of his servant. *Restatement of the Law, Restitution,* Section 87 (a). The Virginia court used the language "technical wrongdoer" to denote the master in this case. There is no analogy between the

technical wrongdoing of the master in the *McLaughlin* case and the actual, personal and primary negligence of the United States in this case.

(f) The United States May Not Recover for the Damage to Its Aircraft Engines.

The United States may not recover for the damage to its aircraft engines for the same reason that it may not recover full indemnity from Savage. This is because the United States was guilty of negligence which has been conceded. It would be an anomaly indeed to deny the United States the right of indemnity because of its own admitted negligence and yet in the same case and under the same circumstances permit it to recover for its own damages. The Court of Appeals reached a consistent result because it disregarded the Virginia statute on contribution in the one case and applied an incorrect doctrine of apparent defects in the other.

The Court of Appeals found Savage liable for the damage to the aircraft engines on the ground that "if the improper loading is apparent, the carrier will be liable notwithstanding the negligence of the shipper" (R. p. 113).

We have already shown that the Savage driver inspected the cargo and found the securing straps in place (p. 16), and that under the doctrine of *Hines* v. *Buchanan, supra* (p. 16), he was under no duty to look for and discover defects when the car is loaded by the shipper. *Ross* v. *Troy & Boston R. R. Co., supra,* has been discussed (p. 17) to show that the carrier is under no duty to "overjudge" the shipper "in a matter in which he assumed to judge and to do all that he required or supposed necessary to be done in the premises * * *." See also *Rixford* v. *Smith, supra.* In

truth then the defect was not "apparent," but in any event the principle of law applied by the Court below is incorrect.

In *St. Louis, etc., R. Co.* v. *Glow Electric Co., supra,* the court said on page 429:

> "If the carrier is able to show that the loss or damage was due to improper loading, it has a complete defense, regardless of whether or not the shipment was inspected by its employees."

There are a number of cases which say (without holding) that contributory negligence is not sufficient to relieve the carrier from liability to the owner. Generally speaking, these cases rely upon or stem from the holding or language used in *McCarthy* v. *Louisville & N. R. Co.,* 102 Ala. 193, 14 So. 370. In that case *the negligence of the shipper,* who was not the owner, was not permitted to bar recovery by *the owner* against the carrier which admitted negligence and as a defense relied upon the contributory negligence of the shipper. The cases which appear to so hold may be divided into two groups:

(1) Cases like the *McCarthy* case in which the owner and shipper are different persons, and there is no agency relationship between them by which the court may properly impute the negligence of one to the other. See particularly *Lehigh Valley R. Co.* v. *State of Russia,* 21 Fed. 2nd 396, and companion case, 21 Fed. 2nd 406;

(2) Cases in which the acts or omissions of the carrier complained of have simply been held not to constitute negligence or a contributing cause. See *Ross* v. *Troy and Boston R. Co., supra; Rixford* v. *Smith, supra; Miltimore* v. *Chicago and Northwestern R. Co., supra; Pennsylvania Co.* v. *Kenwood Bridge Co., supra; Cohn* v. *Platt, supra;* and *Northwestern Marble and Tile Co.* v. *Williams, supra.*

There are still other cases like *Hines* v. *Buchanan, supra,* which gratuitously say that contributory negligence will not bar recovery against the carrier when such an issue is in no wise involved in the case.

Our attention has not been drawn to, nor has our investigation disclosed, any case in which *a clearly negligent owner* has been permitted to recover against the carrier. All the cases cited by the United States in the court below in support of its contention on the subject of contributory negligence fall into some one of the above categories.

While *Hines* v. *Buchanan, supra,* gives lip service to the general proposition that contributory negligence of the shipper does not bar recovery against a negligent carrier, we have examined the briefs in that case and that issue was not before the court. A careful examination of the opinion demonstrates this. Furthermore, in that case the Virginia court simply accepted the doctrine of the *McCarthy* case. On the other hand, there are two older Virginia cases which, by implication at least, would seem to recognize the principle for which we contend here: *Norfolk and Western R. Co.* v. *Southerland,* 89 Va. 703, and *Norfolk and Western R. Co.* v. *Harman,* 91 Va. 601.

In *I. & G. N. R. Co.* v. *Drought* (Tex.), 100 S.W. 1011, seventeen barrels of molasses were lost when they rolled together because of insufficient securing. The court said on page 1013:

> "We do not think that knowledge upon the part of the conductor would relieve a shipper of the effects of his contributory negligence. If the damage to the molasses was caused by the negligence of appellees in loading the car, knowledge of such negligence would not render it any less effective in defeating a claim for damages. *The only inquiry is, did the negligence*

of appellees contribute to the injury to their property?" (Italics supplied.)

See also *Missouri, etc., R. Co.* v. *Belcher* (Tex.), 51 S.W. 706, and *Texas, etc., R. Co.* v. *Klepper* (Tex.), 24 S.W. 567, which support the proposition that contributory negligence of the shipper-owner would bar recovery against a negligent carrier.

In the case of *Rixford* v. *Smith, supra,* the court, by Justice Doe, gives a comprehensive analysis of the liability of a common carrier and the reasons therefor. The court reviews many of the ancient authorities and concludes as follows (p. 49):

> "And it would be contrary to all legal reason, whether of natural justice, public policy or private convenience, to empower an owner of property to compel a common carrier to insure it against the fault of the owner, or against such a fault of the property as must be considered the fault of the owner. Such a system of insurance would encourage fraud, and unreasonably increase the premium which the whole community must pay."

It will be seen that the policy behind the common-carrier liability as an insurer does not and should not extend to a situation like that in the instant case when to sustain that general policy in carrier cases would permit the negligent shipper-owner to recover despite the natural and necessary consequences of his own acts, and "would be contrary to all legal reason, whether of natural justice, public policy or private convenience * * *."

VII.

CONCLUSION

It is accordingly submitted that a writ of certiorari should be granted the petitioner and that this Court should review

the decision of the Court of Appeals for the Fourth Circuit and reverse same and remand the case to it with the directions for which prayer is made in the accompanying petition.

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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 618

SAVAGE TRUCK LINE, INCORPORATED, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The United States District Court for the Eastern District of Virginia did not write an opinion. Its findings of fact, conclusions of law, and judgments appear at pages 21-31 of the record. The opinion of the Court of Appeals (R. 109-116) is reported at 209 F. 2d 442.

JURISDICTION

The opinion of the Court of Appeals was filed on December 21, 1953 (R. 109). The petition for

a writ of certiorari was filed on March 3, 1954. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTIONS PRESENTED

1. Whether, under the federal law applicable to common carriers transporting goods in interstate commerce, a carrier is liable to the shipper for damage to a shipment defectively loaded and secured by the shipper but accepted by the carrier after inspection, where (a) the defect was apparent and the driver of the truck (having knowledge of the nature of the shipment and the manner and method of securing it) failed to exercise ordinary care in his subsequent operation of the truck, and (b) the damage to the shipment occurred because of the driver's negligence.

2. Whether, in the circumstances of this case, the United States was entitled to indemnification for its liabilities to others from Savage Truck Line as the principal offender and, as between them, the party responsible for the accident.

STATUTES AND REGULATIONS INVOLVED

The pertinent portions of the Interstate Commerce Act, 49 U.S.C. §§ 20(11), 316(b), and 319, and the regulations of the Interstate Commerce Commission are set forth in the Appendix, *infra*. pp. 16-18.

STATEMENT

At approximately 5:00 a. m. on the morning of March 29, 1951, a truck owned by Brooks Transportation Co., Inc., and driven by Bernard R. Har-

ris was involved in an accident with a truck owned by Savage Truck Line, Inc., and driven by its employee Zeneth F. Payne (Fdgs. 1, 3, R. 21, 22). The accident occurred on U. S. Route 1, a four lane highway in Virginia, at a point where there is a curve from the southeast to the northeast (Fdgs. 2, 4, R. 21-22). Harris was driving the Brooks truck south in the right hand, south bound lane, and Payne was driving the Savage truck, on which there was loaded a cargo of six airplane engines encased in cylindrical containers, north from Norfolk, Virginia, to Quonset Point, Rhode Island (Fdgs. 3, 4, 5, R. 22). As the Savage truck entered the curve, one or more of the cylindrical containers shifted to the left, causing the driver of the Savage vehicle to cross from the north bound driving lane into the south bound passing lane. As the two trucks passed, one of the containers fell from the Savage truck and collided with the Brooks vehicle, causing the instant death of the driver, Bernard R. Harris. The trailers of the two vehicles scraped each other in passing, and then both turned over on the shoulder of the south bound traffic lane (Fdg. 4, R. 22).

The cylinders had been loaded and secured on the truck by employees of the United States Navy Department in accordance with the Navy's usual practice (Fdg. 5, R. 22-23). The district court found that the officers and employees of the United States were negligent in failing to secure the cargo properly, in the means used to secure the cargo, in failing to inspect the loading before turning the cargo over to Savage for transportation, and in

failing to supervise properly the employees who did the securing (R. 23). As the Court of Appeals noted (R. 113), it was established with certainty that agents of Savage inspected the load before transportation was begun; and the findings of the district court (Fdgs. 6, 7; R. 23), approved by the Court of Appeals (R. 113), were that the employees of Savage failed to exercise ordinary care in accepting the cargo as loaded and that the driver of the truck failed to exercise ordinary care in the subsequent operation of the truck, having knowledge of the nature of the cargo and the method of loading and securing.

Four suits arising out of this accident were instituted in the district court. Two of the actions were brought by Frances E. Harris as executrix of the estate of Bernard R. Harris—one against the United States and one against Savage—to recover damages for his death. Brooks Transportation Co. also filed separate suits against the United States and Savage to recover for damages to its truck and cargo. In the two suits against the United States, the United States filed third party complaints against Savage seeking indemnity for any liability to the primary plaintiffs and also seeking to recover for damages to the airplane engines (R. 3-7). Savage counterclaimed for damages to its truck (R. 11-12), and in the two suits against Savage, it filed third-party complaints against the United States seeking contribution or indemnity for any liabilities to the primary plaintiffs (R. 7-8).

The district court, and, in the actions against Savage, the jury respectively held the United States and Savage liable to the primary plaintiffs (Harris and Brooks). Judgments were entered awarding contribution between the United States and Savage, but denying their claims for indemnity and property damage (R. 28-34).

On appeal, neither the United States nor Savage challenged their liability to the primary plaintiffs, and the issues were limited to their claims against each other for indemnity, contribution, and property damage (R. 111). Because the carrier accepted the shipment after inspection even though the defects of the loading were apparent, and because the Savage driver was subsequently negligent in his operation of the truck, the Court of Appeals held that the United States was entitled to recover for damages to the cargo of airplane engines (R. 112-114). And upon a further evaluation of the relationship between Savage and the United States, as well as the circumstances of the accident, the Court of Appeals reached the conclusion that, as between them, Savage was the principal offender and should indemnify the United States for any damages the United States was required to pay to the primary plaintiffs (R. 114-116). This, in turn, required denial of Savage's claims for contribution, indemnity, and property damage (R. 116).

ARGUMENT

Petitioner seeks to bring before this Court for review a double-barreled decision which, in holding

petitioner liable as a common carrier for damage to a shipment, is supportable by either of two well-established rules of carriers' liabilities and which, in holding it liable to indemnify the shipper for satisfying the claims of the primary plaintiffs, turns upon the application of equally well-established principles to the particular circumstances and relationships of this case. In both respects the decision reaches results clearly correct and just. No conflict exists, and no novel variation requires further consideration or reiteration by this Court of the applicable general principles.

1. Contrary to petitioner's statement of the question (Pet. 7), the right of the United States, as shipper, to recover for damages to the interstate shipment of airplane engines does not turn upon Virginia law but upon acts of Congress and the rules of the common law as applied in the federal courts.[1] *Cincinnati & Tex. Pac. Ry.* v. *Rankin*, 241 U. S. 319, 326-327, and cases there cited. As this Court held in the *Rankin* case, the well known Carmack Amendment to the Interstate Commerce Act, 49 U. S. C. 20(11), *infra*, pp. 16-17 (which has been made applicable to motor carriers engaged in interstate commerce by 49 U. S. C. 319, *infra*, p. 16) has left unchanged the common law liability of common carriers to shippers for goods damaged or lost in transit. That liability is the liability of an insurer

[1] As the Court of Appeals noted (R. 111), the bill of lading throws no added light on the question because it provided only that the shipment was made subject to the rules and conditions applicable to commercial shipments generally.

except for those losses or damages which the carrier brings wholly and exclusively within certain limited exceptions. *Chicago & E. I. R. R. Co.* v. *Collins Co.*, 249 U. S. 186, 193; *Bank of Kentucky* v. *Adams Ex. Co.*, 93 U. S. 174, 181; *Railroad Company* v. *Lockwood*, 17 Wall. 357, 376; *Hannibal Railroad* v. *Swift*, 12 Wall. 262, 273. Although variously expressed in the decisions, those exceptions are generally said to encompass loss or damage arising solely from acts of God, acts of the public enemy, the inherent nature of the goods, or the acts of the shipper. It is this latter exception, phrased in terms of the defense of contributory negligence, which Savage argues should have been applied by the court below (Pet. 9, 25-28).

(a) The Court of Appeals recognized (R. 112-113) that, where the shipper undertakes the loading, the general rule is that he and not the carrier becomes responsible for damage which results from defects which are latent, concealed, or not open to ordinary observation.[2] But as this Court said in *Hannibal Railroad* v. *Swift*, 12 Wall. 262, at 272, where it was argued (12 Wall. at 266) that an army officer was negligent in having his goods loaded

[2] In this case an inspection was actually made and it is therefore unnecessary to determine whether liability for apparent defects attaches only where there has been an inspection. See *Modern Tool Corp.* v. *Pennsylvania R. Co.*, 100 F. Supp. 595, at 598 (D.N.J.). It is also unnecesary to consider petitioner's contention (Pet. 16-17) that it was not under a duty to inspect. However, the duties imposed by statute and regulations on carriers and this Court's decision in the *Hannibal Railroad* case, *supra*, would indicate that there is a duty to inspect owing to shippers and that actual inspection is unnecessary to establish liability on the part of the carrier.

along with explosives in a car selected and locked by his commanding officer,

> * * * If objection existed on any of these grounds, or on any other ground not concealed but open to the observation of the company, it should have been stated before the property was received. * * * Not having thus insisted, but having received the property and undertaken its transportation in the car in which it was placed, the company assumed, with respect to it, the ordinary liabilities of a common carrier.

Petitioner attempts to avoid the controlling effect of the *Hannibal Railroad* case by reliance on early state cases such as *Rixford* v. *Smith*, 52 N. H. 355, 13 A. R. 42 (1872) and *Ross* v. *Troy and Boston R. R. Co.*, 49 Vt. 364, 24 A. R. 144 (1877), decided prior to the enactment of the Carmack amendment and at a time when the controlling effect of federal decisions on liabilities for interstate shipments does not appear to have been generally realized. Petitioner also cites decisions of the state courts of Texas and Wisconsin in support of its position [*i. e.*, *I. & G. N. R. Co.* v. *Drought*, 100 S. W. 1011 (Tex. Civ. App.); *Missouri, etc. Ry. Co.* v. *Belcher*, 41 S. W. 706 (Tex. Civ. App.); *Texas & P. Ry. Co.* v. *Klepper*, 24 S.W. 567 (Tex. Civ. App.); *Miltimore* v. *Chicago and Northwestern R. Co.*, 37 Wis. 190], but later decisions of those courts have either expressly distinguished those rulings or otherwise indicated agreement with what is now regarded as the correct rule.

Abbott v. *Tompkins*, 283 S. W. 647, 648 (Tex. Civ. App.); *Thomson* v. *Chicago, M. & St. P. Ry. Co.*, 195 Wis. 78, 85, 217 N. W. 927, 929. Indeed, so many are the cases applying or stating the rule that it would be impractical to cite them all,[3] but their number leaves no doubt that the rule is, as applied by the court below, that a carrier is liable for damage to a shipment defectively packed, loaded, or secured by the shipper where the defect is apparent and the carrier has accepted the shipment after inspection.[4]

(b) Moreover, there exists an independent ground for imposing liability on Savage which the Court of Appeals found unnecessary to reach. Because the liability of an insurer exists unless the carrier can bring the loss or damage wholly and exclusively within one of the excepted causes, see

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[3] Included in that great list are the following: *Alabama & V. Ry. Co.* v. *American Cotton Oil Co.*, 249 Fed. 308, 311 (C.A. 5); *Blytheville Cotton Oil Co.* v. *Kurn, et al.*, 155 F. 2d 467, 470 (C.A. 6); *Zerega* v. *Poppe*, 30 Fed. Cas. 932, 933, No. 18,213 (S.D. N.Y.); *The David & Caroline*, 7 Fed. Cas. 16, No. 3,593 (C.C. S.D. N.Y.); *Modern Tool Corp.* v. *Pennsylvania R. Co.*, 100 F. Supp. 595, 598 (D.N.J.); *Atlantic Coast Line R. Co.* v. *Rice*, 169 Ala. 265, 52 So. 918; *Mitchell* v. *North Pac. S.S. Co.*, 60 Cal. App. 554, 213 P. 293, 295; *Kinnick* v. *Chicago, R. I. & P. Ry. Co.*, 69 Iowa 665, 29 N.W. 772; *Northwestern Marble & Tile Co.* v. *Williams*, 128 Minn. 514, 151 N.W. 419, 420; *Perkel* v. *Pennsylvania R. Co.*, 148 Misc. 284, 265 N.Y.S. 597, 604 (Mun. Ct.); *Gehrke* v. *Am. Ry. Express Co.*, 61 N.D. 668, 240 N.W. 321, 322; *Abbott* v. *Tompkins*, 283 S.W. 647, 648 (Tex. Civ. App.); *Hines* v. *Buchanan*, 131 Va. 88, 109 S.E. 219; *Thomson* v. *Chicago, M. & St. P. Ry. Co.*, 195 Wis. 78, 86, 217 N.W. 927, 929. See also 13 C.J.S. § 67(b); 9 Am. Juris. § 730.

[4] *Hines* v. *Buchanan*, 131 Va. 88, 109 S.E. 219, does not hold to the contrary. There the carrier did not inspect the boxcar shipment and it had no notice of the defective loading by the shipper.

pp. 6-7, *supra*, the carrier is liable to the shipper if its negligence was only one of the causes of the accident. The defense of contributory negligence, which assumes that the defendant has been negligent, is accordingly inapplicable.[5] Thus, if, as here, the carrier has been guilty of some negligent act, without which the loss would not have occurred, the carrier is liable notwithstanding that the shipper's hidden negligent packing, loading, or securing may have contributed to the accident.[6] Petitioner attempts to rationalize these decisions (Pet. 26) on the ground of a lack of an agency relationship between the owner and the shipper, but this explanation emphasizes a factor not mentioned in the decisions.[7] Also, it would logically require, contrary to the accepted rule, the imposition of liability on the carrier where the defects were hidden or

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[5] *Lehigh Valley R. Co.* v. *State of Russia*, 21 F. 2d 396, 405 (C.A. 2); *Southern Ry. Co.* v. *Frank de Latour*, 223 Ala. 245, 135 So. 187; *Northwestern Marble & Tile Co.* v. *Williams*, 128 Minn. 514, 151 N.W. 419, 420.

[6] *Lehigh Valley R. Co.* v. *State of Russia*, 21 F. 2d 406, 408 (C.A. 2), certiorari denied, 275 U.S. 571; *Lehigh Valley R. Co.* v. *State of Russia*, 21 F. 2d 396, 405 (C.A. 2), certiorari denied, 275 U.S. 571; *Zerega* v. *Poppe, et al.*, 30 Fed. Cas. 932, 933, No. 18,213 (S.D. N.Y.); *McCarthy* v. *Louisville & N. R. Co.*, 102 Ala. 193, 14 So. 370; *Northwestern Marble & Tile Co.* v. *Williams*, 128 Minn. 514, 151 N.W. 419. Cf. *Commodity Credit Corporation* v. *Norton*, 167 F. 2d 161 (C.A. 3). See *In the Matter of Bills of Lading*, 52 I.C.C. 671, 679; cf. also *Chicago & E. I. R. R. Co.* v. *Collins Co.*, 249 U.S. 186; *Chesapeake & O. Ry. Co.* v. *J. Wix & Sons*, 87 F. 2d 257 (C.A. 4); *American Ry. Exp. Co.* v. *Ewing Thomas Converting Co.*, 292 Fed. 335 (C.A. 3); *The Huntress*, 12 Fed. Cas. 984, No. 6,914 (D. Me.).

[7] See *Louisville & N. R. Co.* v. *Hendricks*, 233 Ala. 259, 171 So. 273, holding the rule applicable in a case where the shipper was also owner of the property.

latent, if there was a similar lack of agency between owner and shipper. Petitioner is reluctantly forced to concede (Pet. 27) that even *Hines* v. *Buchanan*, 131 Va. 88, 109 S.E. 219, on which it elsewhere relies (see fn. 4, p. 9, *supra*), restates the rule that contributory negligence is not a defense to a negligent carrier sued by a shipper. [8]

2. As the Court of Appeals noted (R. 114-115), and as petitioner apparently concedes (Pet. 14, 21-23), there are a variety of circumstances in which courts have allowed indemnity between parties, each of whom is liable for damages to a third party for a wrongdoing. See *Union Stock Yards Co.* v. *Chicago &c. R. R. Co.*, 196 U.S. 217, 224; cf. *Slattery* v. *Marra Bros., Inc.*, 186 F. 2d 134, 138-139 (C.A. 2). Recovery may be had by a municipality for liability to pedestrians injured, on account of the negligence of others, while using the city's sidewalks (*Washington Gas Co.* v. *Dist. of Columbia*, 161 U.S. 316; *Chicago City* v. *Robbins*, 2 Block 418; Restatement, *Restitution*, § 95) or by landowners for liability caused by the negligence of another (*Scott* v. *Curtis*, 195 N.Y. 424, 88 N.E. 794; Restatement, *Restitution*, § 96). Of special pertinence to this case is the principle under which indemnity has been allowed on what has been called a "last clear chance" basis:—a person whose negligence has

[8] In restating the rule, the Supreme Court of Virginia was not troubled by what petitioner considers to be contrary implications (Pet. 27) from the language used in the earlier decisions in *Norfolk and Western R. Co.* v. *Sutherland*, 89 Va. 703, and *Norfolk and Western R. Co.* v. *Harman*, 91 Va. 601, both of which allowed recoveries against common carriers.

combined with the subsequent negligence of another so as to render the first tortfeasor liable to a third person is entitled to indemnity from the later wrongdoer if the latter knew of the perilous condition created by the former and could have averted the harm at a time when the former was unable to do so. *Nashua Iron & Steel Co.* v. *Worcester & Nashua R. Co.*, 62 N. H. 159; Colonial *Motor Coach Corp.* v. *New York Central R. Co.*, 228 N. Y. S. 508 (Sup. Ct.); *Colorado & S. Ry. Co.* v. *Western Light & Power Co.*, 73 Colo. 107, 214 Pac. 30; *Missouri, K. & T. Ry. Co.* v. *Missouri Pac. Ry. Co.*, 103 Kan. 1, 175 Pac. 97; cf. *Austin Electric Ry. Co.* v. *Faust*, 63 Tex. Civ. App. 91, 133 S. W. 449. See *Knippenberg* v. *Lord & Taylor*, 193 App. Div. 753, 184 N. Y. S. 785 (1st Dept.). See also Leflar, *Contribution and Indemnity Between Tortfeasors*, 81 U. of Pa. L. Rev. 130, 151-154; Hodges, *Contribution and Indemnity Among Tortfeasors*, 26 Tex. L. Rev. 150, 163-165; Prosser, *Torts*, p. 1116.

The court below also noted (R. 115) that, "* * * The existence of a contractual relationship between joint wrongdoers, and the breach of the duty by the one burdened therewith in the course of performing a separate and independent act without which the injury would not have occurred, are weighty circumstances in identifying the principal offender and saddling him with the liability of an indemnitor. *Burris* v. *American Chicle Co.*, 2 Cir., 120 F. 2d 218; *Rich* v. *United States*, 2 Cir., 177 F. 2d 688. * * *." Here, when property of the United States was tendered to Savage, the carrier was obligated

either to reject it or to handle the shipment with due care for its condition—indeed, with such care that the carrier's obligations were those of an insurer. See pp. 6-7, *supra*. Not only did Savage fail to discharge its insurer's obligations, but its driver failed to exercise ordinary care even though he had knowledge of the dangerous condition of the cargo. Cf. Restatement, *Restitution* § 97. Certainly, there is no need for this Court to review the propriety of the determination by the court below that these and the other circumstances of the case justified the allowance of indemnity to the United States and the ultimate imposition of full liability on Savage.

Nor is there any reason for this Court to consider the alleged conflict of the decision below with Virginia law (Pet. 23-25). Since the right to indemnity in this case involves the protection of federally owned property and the public purse, as well as the general relationship of the Government to carriers transporting its property in interstate commerce, it would seem that the right should be determined under the principles of general, federal law, rather than of Virginia law. Cf. *United States* v. *Standard Oil Co.*, 332 U. S. 301; *Gilman* v. *United States*, 206 F. 2d 846, 848-849 (C. A. 9), now pending decision after argument in this Court on a writ of certiorari granted in 346 U. S. 914; 3 Moore, *Federal Practice* (2d Ed.) § 14.29.

In any event, as the court below noted (R. 116), the law of Virginia appears to be in line with the general law in this respect, and no question of con-

flict between federal and Virginia law is presented. The cases cited by petitioner to support the contrary view hold only that in Virginia a defendant cannot avoid his liability to an injured person by showing the negligence of another or that the common law rule against contribution between tortfeasors has been abolished. None of these decisions holds that indemnity cannot be allowed in a case such as this, and the opinion of the Supreme Court of Virginia in *McLaughlin* v. *Siegel,* 166 Va. 374, at 377, 185 S. E. 873, at 874, specifically states that a party who has been only a technical wrongdoer may be entitled to indemnity from the actual wrongdoer. Moreover, since the last clear chance doctrine has received a much more liberal application in Virginia than in some other jurisdictions (see *Barnes* v. *Ashworth,* 154 Va. 218, 242-243, 153 S. E. 711, 718), it is not too much to say that if this exact question were presented to the Supreme Court of Virginia it would probably hold that indemnity should be allowed on that basis. But for certiorari purposes it should be dispositive that no contrary decision has yet been rendered by the state court and that the court below, which is constantly called upon to pass on questions arising under Virginia law, believes its decision to be in conformance with the law of that State. Cf. *Propper* v. *Clark,* 337 U. S. 472, 486-487; *Estate of Spiegel* v. *Commissioner,* 335 U. S. 701, 707-708; cf. also *United States* v. *Gerlach Live Stock Company,* 339 U. S. 725, 755.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

49 U.S.C. 319 provides:

> The provisions of section 20 (11) and (12) of this title, together with such other provisions of chapter 1 of this title (including penalties) as may be necessary for the enforcement of such provisions, shall apply with respect to common carriers by motor vehicle with like force and effect as in the case of those persons to which such provisions are specifically applicable.

49 U.S.C. 20(11) provides, in pertinent part:

> Any common carrier, railroad, or transportation company subject to the provisions of this chapter receiving property for transportation from a point in one State or Territory or the District of Columbia to a point in another State, Territory, District of Columbia, or from any point in the United States to a point in an adjacent foreign country shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass within the United States or within an adjacent foreign country when transported on a through bill of lading, and no contract, receipt, rule, regulation, or other limitation of any character whatsoever shall exempt such common carrier, railroad,

or transportation company from the liability hereby imposed; and any such common carrier, railroad, or transportation company so receiving property for transportation from a point in one State, Territory, or the District of Columbia to a point in another State or Territory, or from a point in a State or Territory to a point in the District of Columbia, or from any point in the United States to a point in an adjacent foreign country, or for transportation wholly within a Territory, or any common carrier, railroad, or transportation company delivering said property so received and transported shall be liable to the lawful holder of said receipt or bill of lading or to any party entitled to recover thereon, whether such receipt or bill of lading has been issued or not, for the full actual loss, damage, or injury to such property caused by it or by any such common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass within the United States or within an adjacent foreign country when transported on a through bill of lading, notwithstanding any limitation of liability or limitation of the amount of recovery or representation or agreement as to value in any such receipt or bill of lading, or in any contract, rule, regulation, or in any tariff filed with the Interstate Commerce Commission; and any such limitation, without respect to the manner or form in which it is sought to be made is declared to be unlawful and void * * *

49 U.S.C. 316(b) provides:

> (b) It shall be the duty of every common carrier of property by motor vehicle to provide safe and adequate service, equipment, and facilities for the transportation of property in interstate or foreign commerce; to establish, observe, and enforce just and reasonable rates, charges, and classifications, and just and reasonable regulations and practices relating thereto and to the manner and method of presenting, marking, packing, and delivering property for transportation, the facilities for transportation, and all other matters relating to or connected with the transportation of property in interstate or foreign commerce.

A regulation of the Interstate Commerce Commission, 49 C.F.R. 193.9, provides, in pertinent part:

> § 193.9 *Safe loading*—(a) *Distribution and securing of load.* The load on every motor vehicle transporting property shall be properly distributed, and if necessary, secured, in order to prevent unsafe shifting of the load or unsafe operation of the vehicle.
>
> (b) *Fastenings secure.* No more vehicle shall be driven unless the driver thereof shall have satisfied himself that the tailboard or tailgate, tarpaulins, spare tires, and all means of fastening the load are securely in place.

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